No. 14-361

In the Supreme Court of the United States

SAMUEL OCASIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Hobbs Act defines extortion to include "the obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). The question presented is:

Whether a conviction under the general federal conspiracy statute, 18 U.S.C. 371, may be based on Hobbs Act extortion where a public-official defendant has formed an agreement to obtain property from someone within the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 750 F.3d 399.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2014. A petition for rehearing was denied on May 28, 2014. On July 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 25, 2014, and the petition was filed on that date. The petition was granted on March 2, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to interfere with commerce by extortion under the Hobbs Act, in violation of 18 U.S.C. 371, and three counts of interfering with commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Pet. App. 46, 51. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 47-48, 52-53. The district court also ordered petitioner to pay $3,370.58 in restitution. *Id.* at 15-16; C.A. App. 1472. The court of appeals affirmed petitioner's convictions, Pet. App. 16-25, but vacated the restitution order in part and remanded for further proceedings concerning restitution, *id.* at 28-29. On remand, the district court amended the judgment and ordered restitution of $1500. *Id.* at 53-54.

1. a. Hernan Alexis Moreno Mejia (known as Alex Moreno) and Edwin Javier Mejia (known as Edwin Mejia), who are brothers, co-owned and operated a Baltimore-area car repair shop called Majestic Auto Repair Shop, LLC (Majestic).[1] Pet. App. 2. In 2008, Majestic did not "have a high volume of cars coming" in for repairs. J.A. 95. Accordingly, the shop's owners struck a deal with Officer Jhonn Corona of the Baltimore Police Department (BPD): Officer Corona would send car accident victims to Majestic for repairs; in return, Majestic would pay Officer Corona a kickback of $150 per vehicle. J.A. 95-96, 150.[2]

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[1] Majestic was originally a limited liability company but became a corporation in 2010. C.A. App. 655-656, 736; see J.A. 145.

[2] That practice violated BPD policy in at least two ways. First, BPD regulations prohibited officers from "solicit[ing] or

Officer Corona spread word to other BPD officers, who joined the scheme and collected between $150 and $300 for each car referred to Majestic. J.A. 96; Pet. App. 6. Some officers even set up a referral "network," through which they would receive a portion of another officer's kickback as a fee for "recruiting" that officer into the scheme. J.A. 126, 129. Between 2008 and 2011, as many as 60 BPD officers received payments from Majestic. J.A. 96.

As Moreno later explained, the kickback scheme allowed for a "beneficial" division of labor. J.A. 97. When car accidents occur, "the first people to go to the scenes" are police officers; for that reason, the participating officers were well positioned to ensure that damaged cars were sent to Majestic rather than to another shop. *Ibid.* If a car was still drivable, Moreno or Mejia would create a phony towing record "to prove to the insurance company that [the] car was actually damaged before it got to the shop." J.A. 152-153. Once the car was at the shop, Moreno often caused additional damage—in order to ensure that the repairs were reimbursable according to insurance "protocols" (J.A. 101-102, 107), and to conform the damage to police accident reports, which the participating officers fabricated to increase insurance reimbursements (J.A. 139). Payments from insurance companies were deposited directly into Majestic's

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accept[ing]" any "compensation[], reward, gift or other consideration * * * without special permission of the police commissioner." C.A. App. 209; see Pet. App. 6. Second, for cars that needed towing, the BPD's towing procedures required investigating officers to contact, through dispatch, a pre-approved towing company that already had a contract with the City of Baltimore. Pet. App. 6-7; C.A. App. 213-214. Majestic was not such a company. J.A. 104; Pet. App. 7.

business account (J.A. 145-147, 149-150), and Moreno used the same account to make the payments to officers (J.A. 97-98, 149). Finally, Mejia would conceal these kickbacks on Majestic's books by categorizing them as "advertising and promotion." J.A. 158-159; see J.A. 150-151.

The scheme proved financially "beneficial" to Majestic, Moreno, and Mejia. J.A. 96. Once Moreno began paying the officers, the volume of Majestic's business "increased quickly" (J.A. 100), and its profits similarly grew (J.A. 110). Moreno and Mejia even argued about whether the shop was getting "too many" cars. J.A. 109. By January 2011, at least 90% of Majestic's business consisted of officer referrals. J.A. 100, 127.

b. In October 2007, the BPD hired petitioner as a police officer and assigned him to the night shift in south Baltimore. J.A. 75; C.A. App. 253. By May 2009, petitioner had learned of the kickback scheme from another BPD officer, likely Officer Leonel Rodriguez. J.A. 111-114; Pet. App. 7-8 & n.7. According to Moreno, Officer Rodriguez or another officer "recruited" petitioner for the scheme and put him in touch with Moreno. J.A. 136-137, 174; see J.A. 130.

On several occasions from May 2009 through about February 2011, petitioner persuaded accident victims to have their damaged cars towed to and repaired by Majestic. Pet. App. 7-8. Often petitioner would call Moreno from the scene of the accident to describe the vehicle—its make, model, age, and the extent of any damage. *Ibid.* Moreno preferred newer models because they were less likely to be written off by the insurance company as "a total loss." J.A. 105; see J.A. 124. Also preferable were cars with "full cover,"

meaning that "the car at fault was a luxury vehicle and that its insurer would pay for the damages." Pet. App. 9; see J.A. 106-107 (cars with deployed airbags were disfavored). If Moreno wanted a car, petitioner would convince the owner to have it towed to the shop. Pet. App. 8, 10. After referring a car to Majestic, petitioner would call Moreno and request a $300 payment, usually by the next afternoon. *Id.* at 8-12. Petitioner collected payments in person from Moreno at Moreno's home, an ATM, or a convenience store. *Id.* at 10-12.

Petitioner also used Majestic's services himself. Pet. App. 12-13. For example, when his wife was involved in a minor traffic accident, petitioner, at Moreno's suggestion, overstated the damage in a claim form filed with his insurer. *Id.* at 12; C.A. App. 393-395, 636-637. Moreno then caused additional damage to the car in a manner consistent with petitioner's description, repaired the damage, and billed petitioner's insurance company, which paid for the repairs and was later reimbursed by the other driver's insurer. Pet. App. 12-13; C.A. App. 393-398, 636-637. Moreno paid petitioner a $300 kickback for bringing his car to the shop and also covered his insurance deductible and car rental fees. Pet. App. 13; C.A. App. 399. Moreno explained at trial that he did so to "make [petitioner] happy" and to ensure that petitioner would "keep sending cars to Majestic." C.A. App. 399; see Pet. App. 13.

Finally, petitioner sought to bring other BPD officers into the scheme. See J.A. 125. Petitioner's goal was to "create a network" of officers who would give him a cut of every kickback they received from Majestic. J.A. 129; see J.A. 126 (petitioner sought to follow

the "example" of "officers [who] were making money off other officers"). Ultimately, petitioner recruited at least one other officer and put him in touch with Moreno. J.A. 138 ("I asked him if he knew about the cars. He stopped me right there. He was like no, no, no, I've already got it, Ocasio explained that to me."); see J.A. 172-173 (Moreno told the FBI that petitioner had recruited two other officers.).

2. In February 2011, after "an extensive investigation conducted by the BPD and the FBI" (Pet. App. 5), federal agents arrested Moreno, Mejia, petitioner, and several other BPD officers (C.A. App. 1030-1032). In March 2011, a grand jury in the District of Maryland indicted Moreno, Mejia, petitioner, and nine other BPD officers—including Officer Rodriguez, who had initially recruited petitioner into the kickback scheme. J.A. 24-32. Most of the officers pleaded guilty, as did Moreno and Mejia. Pet. App. 3 & n.2.

In October 2011, the grand jury returned a Superseding Indictment charging that petitioner and Officer Kelvin Manrich had conspired with other BPD officers and with Moreno and Mejia to interfere with commerce by extortion under the Hobbs Act, 18 U.S.C. 1951. J.A. 33-43. The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Count One alleged a violation of the general federal conspiracy statute, 18 U.S.C. 371. J.A. 36-39. The "purpose of the conspiracy [was] for Moreno and Mejia to enrich over 50 BPD Officers, including [petitioner], and to benefit Moreno and Mejia by issuing payments to the BPD Officers in exchange for the BPD Officers' exercise of their offi-

cial positions and influence to cause vehicles to be towed or otherwise delivered to Majestic for automobile services and repair." J.A. 36-37. The Superseding Indictment also charged petitioner with three substantive counts of interfering with commerce by extortion, in violation of 18 U.S.C. 1951(a) (Counts 5, 6, and 7). J.A. 41-42.

Before trial, petitioner sought a jury instruction providing that the government, in order to convict him of conspiracy to violate the Hobbs Act, had to prove "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy." J.A. 53. The government opposed the request and moved to preclude petitioner from making that argument to the jury. J.A. 57; see J.A. 61. The district court did not rule on either request before trial.

Petitioner and Officer Manrich were tried together. Pet. App. 13-14. Moreno, Mejia, and other witnesses testified to the facts described above. *Id.* at 3, 14. Throughout the trial, petitioner maintained that Moreno was the animating force behind the kickback scheme. For example, in his opening statement, petitioner's counsel stated that Moreno was a "cancer" on society who had "corrupted a great number of Baltimore City police officers," but "did not corrupt my client, Samuel Ocasio." J.A. 70; see J.A. 71 ("So what Moreno was doing, he was corrupting police officers. He was cheating insurance companies. Quite honestly, he is making all of our insurance rates go up."). Similarly, during cross-examination, petitioner asked Moreno: "You in fact recruited most of the officers, did you not?" J.A. 127. And in closing, petitioner argued that "Moreno, and to a lesser extent, his

brother, Edwin Mejia, were clearly involved in this conspiracy up to their ears to get policemen to refer cars to them." C.A. App. 1226; see *id.* at 1232 (arguing that Moreno was "the ultimate schemer" who "cheat[s] everybody that comes into his path").

At the conclusion of the government's evidence and again at the close of all the evidence, petitioner moved for a judgment of acquittal, arguing that he could not be convicted because "the proceeds from the conspiracy were extracted from" the shop's owners, who were co-conspirators. J.A. 176; see J.A. 190. The district court denied the motions because (1) the Fourth Circuit had already rejected the argument that the property in a Hobbs Act conspiracy must come from someone outside the conspiracy; and (2) Majestic, not its owners, "was actually the source of the payment[s]" in this case. J.A. 179; see J.A. 190.

Over petitioner's objection, the district court also declined to instruct the jury that the government had to prove "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy." J.A. 53; see Pet. App. 30-31. As part of its conspiracy instruction, however, the court "caution[ed]" the jury "that mere knowledge or acquiescence, without participation in the unlawful plan, [was] not sufficient" to "establish membership in the conspiracy." J.A. 195. Rather, the government was required to show that the conspirators had "a mutual understanding * * * to cooperate with each other to accomplish an unlawful act" (J.A. 192) and that the defendant had joined the conspiracy "with the intention of aiding in the accomplishment of those unlawful ends" (J.A. 195).

Officer Manrich pleaded guilty before the case was submitted to the jury. Pet. App. 15. The jury found petitioner guilty on the conspiracy count and all three substantive counts, and the district court sentenced him to 18 months of imprisonment. *Id.* at 47-48. Petitioner was also ordered to pay $3,370.58 in restitution. *Id.* at 15-16; C.A. App. 1472.

3. The court of appeals affirmed petitioner's convictions.[3] Pet. App. 1-29.

On appeal, petitioner did not contest that the trial evidence was sufficient to prove that he had committed extortion in violation of the Hobbs Act. He argued that he could not be convicted of conspiracy, however, because in his view "conspiring to extort property from one's own coconspirator does not contravene federal law." Pet. App. 16. For that argument, petitioner relied on the Sixth Circuit's decision in *United States* v. *Brock*, 501 F.3d 762 (2007), which held that "[t]o be covered by the [Hobbs Act], the alleged conspirators * * * must have formed an agreement to obtain 'property from *another*,' which is to say, formed an agreement to obtain property from someone outside the conspiracy." *Id.* at 767.

The court of appeals rejected petitioner's argument, holding "that a person * * * who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme[] can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement."

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[3] As noted (p. 2, *supra*), the court of appeals partially vacated the district court's award of restitution and remanded for further proceedings concerning restitution. Pet. App. 25-29. On remand, the district court amended the judgment and ordered total restitution of $1500 rather than $3,370.58. *Id.* at 53-54.

Pet. App. 22. "That rule," the court observed, "comports with basic conspiracy principles," inasmuch as "[o]ne who knowingly participates in a conspiracy to violate federal law can be held accountable for not only his actions, but also the actions of his coconspirators." *Ibid.*

The court of appeals disagreed with petitioner's argument that "the Hobbs Act's 'from another' language requires that a coconspirator obtain property from someone outside the conspiracy." Pet. App. 23 (citation and internal quotation marks omitted). The court explained that "'from another'" simply "refers to a person or entity other than the public official" who received the property. *Ibid.* In the court's view, "'another' can also be a coconspirator of the public official," provided that the co-conspirator "actively participates" in the conspiracy "rather than merely acquiesc[ing]" in it. *Id.* at 22-23. That is because, the court explained, a bribe-payor's "mere acquiescence" in a payment, without more, would fall short of the "agreement [necessary] to enter into a conspiracy." *Id.* at 23-24. Accordingly, the court reasoned, petitioner was "wrong to suggest that every extortion scheme will necessarily involve a conspiracy to commit extortion." *Id.* at 24.

Finally, the court of appeals also pointed out that petitioner's argument rested on a "flawed * * * evidentiary premise," inasmuch as Moreno and Mejia were not "his only coconspirators." Pet. App. 25 n.14. The evidence at trial "established a wide-ranging conspiracy involving dozens of BPD officers who received money for referring wrecked vehicles to the Majestic Repair Shop." *Ibid.* In the court's view, "the jury was entitled to find" that petitioner had con-

spired with those other officers—irrespective of Moreno's and Mejia's active involvement in the scheme. *Ibid.*

SUMMARY OF ARGUMENT

Petitioner was validly convicted of conspiring to violate the Hobbs Act by joining and participating in a scheme to obtain "property from another, with his consent * * * under color of official right." 18 U.S.C. 1951(b)(2). He argues that conspirators must agree to obtain property from someone outside the conspiracy, but that contention is at odds with the Act itself and with longstanding principles of conspiracy law.

A. Petitioner, a police officer, formed and carried out an agreement to commit Hobbs Act extortion. He agreed with the owners of a body shop, and with other police officers, that the officers would "obtain[] a payment to which [they were] not entitled, knowing that the payment was made in return for official acts," *Evans* v. *United States*, 504 U.S. 255, 268 (1992), namely, referrals of wrecked vehicles to the shop. All participants, including the shop's owners, actively participated in that scheme.

B. Petitioner's primary textual argument against conspiracy liability rests on the requirement that property be obtained "from another." Petitioner asserts that when conspirators merely agree "to exchange property between themselves," then "[t]heir agreement does not concern 'another' at all—only themselves." Pet. Br. 22. That argument is premised on the mistaken assumption that all conspirators must agree to commit every element of the crime. But "a conspirator [need] not agree to commit or facilitate each and every part of the substantive offense." *Salinas* v. *United States*, 522 U.S. 52, 63 (1997).

Indeed, a conspirator may face liability "even though he was incapable of committing the substantive offense" himself. *Id.* at 64. Although the shop's owners did not agree that *they* would obtain property "from another," all participants in the kickback scheme agreed on a common goal: that police officers would perform official acts in order to obtain property from another. Petitioner's other textual arguments rely on the same mistaken premise.

Petitioner's interpretation would also perversely punish the government for alleging and proving additional facts at trial, as this case illustrates. Had petitioner been accused of conspiring *solely* with fellow officers, even petitioner would concede that all elements of the conspiracy would be satisfied. But because the government accused him of conspiring "with other Baltimore Police Department Officers * * * , *and with Moreno and Mejia*," petitioner says the prosecution was defective. J.A. 36 (emphasis added). There is no reason that a narrower conspiracy involving fewer participants should receive criminal punishment, while a broader one involving more participants receives none.

Petitioner's reading is further flawed, because it would cause serious conceptual problems in cases involving payments from artificial entities, such as businesses, that can act only through their agents. And it would have anomalous consequences for conspiracy charges based on other federal criminal statutes that prohibit transfers "from another" or "to another"—many of which often involve collusive action between the transferee and transferor.

C. Petitioner's purpose-based arguments are equally unpersuasive. First, he asserts that the gov-

ernment's reading of the Hobbs Act "turns every act of receiving a bribe into a conspiracy to commit extortion." Pet. Br. 37 (capitalization altered). He reasons that, because the Act requires property to be obtained with "consent," 18 U.S.C. 1951(b)(2), that same consent will also "establish that the bribe-payor and the public official *agreed*" to the transaction. Pet. Br. 37. But the Act's "consent" requirement sets a far lower threshold than the *mens rea* necessary for conspiracy; "consent" may be shown even when a conspiratorial agreement does not exist.

Petitioner is also wrong in suggesting that the Fourth Circuit "fabricated" a distinction between a bribe-payor's "mere acquiescence" to an official demand, as opposed to his "active participation" in the scheme. Pet. Br. 46. That distinction is drawn directly from this Court's conspiracy case law. See *United States* v. *Holte*, 236 U.S. 140 (1915); *Gebardi* v. *United States*, 287 U.S. 112 (1932). In the years since *Gebardi*, numerous courts have applied the mere acquiescence/active participant distinction to Hobbs Act extortion, with no hint of difficulty or unfairness.

Finally, the government's approach would not impose liability on extortion "victims." Pet. Br. 17, 18, 23. When a public official commits extortion by trading official acts for private gain, the true victim is the public, because "extortion is an abuse of public justice." 4 William Blackstone, *Commentaries on the Laws of England* 141 (1769) (emphasis omitted). To call Moreno and Mejia "the victims of their own conspiracy" (Pet. Br. 2) ignores their active and moving role in instigating the scheme and ensuring its success.

D. Even if petitioner were correct that a Hobbs Act conspiracy must involve conspirators other than the bribe-payor, such a conspiracy existed in this case. The indictment alleged, and the evidence at trial proved, that petitioner conspired with his fellow police officers. Any error in instructing the jury that the shop owners were co-conspirators as well was accordingly harmless.

ARGUMENT

A PUBLIC OFFICIAL WHO AGREES TO OBTAIN PROPERTY FROM A CO-CONSPIRATOR IN EXCHANGE FOR PUBLIC ACTS MAY BE PROSECUTED FOR CONSPIRACY TO COMMIT EXTORTION

The general federal conspiracy statute makes it an offense when "two or more persons conspire * * * to commit any offense against the United States" and one of the conspirators commits an overt act in furtherance of the offense. 18 U.S.C. 371. When the conspiracy is to violate the Hobbs Act through extortion by a public official, the conspirators must agree that the official will "obtain[] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans* v. *United States*, 504 U.S. 255, 268 (1992). That is what occurred in this case: The conspirators agreed that petitioner and other BPD officers would use their authority to funnel car accident victims to Majestic, in return for payments from the shop's owners.

Petitioner contends that, because the alleged conspirators must conspire to obtain "property *from another*, with his consent," 18 U.S.C. 1951(b)(2) (emphasis added), the conspirators must agree to obtain property from someone outside the conspiracy. But not every conspirator must agree to commit (or

must be capable of committing) every element of the substantive crime. The conspirators need only agree that *the public official* will obtain property from another, with the other's consent, and that the provider of the property will actively participate in the scheme. Petitioner and his co-conspirators satisfied those requirements by jointly forming a plan in which petitioner would sell "public favors for private gain." *Wilkie* v. *Robbins*, 551 U.S. 537, 564 (2007). And even under petitioner's own theory, the evidence clearly established his liability.

A. Conspiracy To Violate The Hobbs Act Requires Only An Agreement For That Unlawful Purpose And An Overt Act In Furtherance Of The Agreement

"The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). When two or more people join forces to obtain an objective that the law forbids, and "one or more of [them] do any act to effect the object of the conspiracy," then they may be found in violation of the general federal conspiracy statute. 18 U.S.C. 371. Together with the shop's owners and with other BPD officers, petitioner formed an agreement whose objective was for petitioner and other officers to commit "extortion" under the Hobbs Act—that is, for the officers to exchange official acts for money. Having formed and carried out that agreement, petitioner was guilty of criminal conspiracy.

1. "A conspiracy is a partnership in criminal purposes." *United States* v. *Kissel*, 218 U.S. 601, 608 (1910). Congress long ago recognized that "collective criminal agreement * * * presents a greater potential

threat to the public than individual delicts." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). Among other things, a conspiracy serves "to unite, back of a criminal purpose, the strength, opportunities and resources of many," creating a multifarious organization that is "obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer." *Krulewitch* v. *United States*, 336 U.S. 440, 448-449 (1949) (Jackson, J., concurring). Joint activity allows for a division of labor among conspirators, "mak[ing] possible the attainment of ends more complex than those which one criminal could accomplish." *Callanan*, 364 U.S. at 593. And the creation of an ongoing criminal enterprise also "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Id.* at 594. For these and other reasons, "[i]t has been long and consistently recognized * * * that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

Under the general federal conspiracy statute, "two or more persons [who] conspire * * * to commit any offense against the United States" are guilty of conspiracy if any one of them "do[es] any act to effect the object of the conspiracy." 18 U.S.C. 371. The statute thus has two elements: (1) an agreement between two or more conspirators "to commit any offense against the United States"; and (2) an overt act by one of them "to effect the object" of that agreement. The first element resembles forming an agency relationship: It is an "'agreement[] to agree' on the multitude of decisions and acts necessary to successfully pull off a crime." *United States* v. *Townsend*, 924 F.2d 1385,

1394 (7th Cir. 1991). Accordingly, although the conspirators must "pursue the same criminal objective," a conspirator need not agree that he, himself, will "commit or facilitate each and every part of the substantive offense." *Salinas* v. *United States*, 522 U.S. 52, 63 (1997). Rather, it is sufficient that all members of the conspiracy have committed themselves towards the same unlawful goal. See *id.* at 64 ("If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.").

2. The Hobbs Act prescribes criminal punishment for "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). As this Court has explained, the statute thus combines two categories of criminal conduct—"coercive extortion and extortion by official right"—that had been treated as separate offenses under New York penal law and the 19th-century Field Code, which were Congress's two models in adopting the Hobbs Act. *Evans*, 504 U.S. at 261 n.9.

At issue in this case is extortion by official right, traditionally a common law offense "committed by a public official who took 'by colour of his office' money that was not due to him for the performance of his official duties." *Evans*, 504 U.S. at 260 (citation and footnotes omitted). As incorporated by the Hobbs Act, extortion by official right covers at least two

categories of wrongdoing by public officials. The first category is "extortion accomplished by fraud," for instance where an official falsely claims entitlement to a fee for his services. *Id.* at 269; see *ibid.* ("wrongful takings under a false pretense of official right"). The second category, which was at issue in *Evans* itself, is "the rough equivalent of what we would now describe as 'taking a bribe.'" *Id.* at 260. A public official commits this form of extortion if he "has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268. Although the payment must be accepted by the public official "in return for his agreement to perform specific official acts," *ibid.*, the exchange need not be "*initiated* by the recipient of the bribe," *id.* at 266. See *ibid.* (government need not "pro[ve] that the inducement took the form of a threat or demand").

3. Petitioner does not deny that he was validly convicted of substantive acts of extortion. See Pet. Br. 1 ("Under this Court's precedent, petitioner's conduct constitutes extortion."). Nor could he. The evidence at trial overwhelmingly showed that petitioner accepted multiple payments from the body shop's owners in return for using his influence as a police officer to funnel car accident victims to their shop. That was public-official extortion as the Act defines it: Petitioner "obtain[ed] * * * property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2).

As noted above, for petitioner also to be guilty of conspiracy, the government was required to prove (1) that he agreed with one or more persons "to commit any offense against the United States"; and (2) one of the conspirators took an overt act "to effect

the object" of their agreement. 18 U.S.C. 371. The evidence established that distinct offense as well.

The first element was satisfied by the conspirators' agreement to "pursue the same criminal objective." *Salinas*, 522 U.S. at 63. Petitioner agreed "with other Baltimore Police Department Officers * * * and with Moreno and Mejia" that Majestic would "issu[e] payments to the BPD Officers in exchange for the BPD Officers' exercise of their official positions and influence." J.A. 36 (superseding indictment). The body shop's owners closely aligned themselves with petitioner and other participating officers in active pursuit of that common goal. The conspirators thus agreed that petitioner and other officers would "commit an[] offense against the United States."

That criminal agreement, moreover, had precisely the characteristics that make conspiracies so dangerous. It united the "opportunities and resources" of BPD officers such as petitioner—namely, the officers' access to and influence over car accident victims —together with the business assets and know-how of the shop's owners. See *Krulewitch*, 336 U.S. at 448 (Jackson, J., concurring). Participating BPD officers also used their access *to other officers* in order to recruit new co-conspirators, thereby extending the conspiracy's reach. This division of labor enabled a far broader and "more complex" scheme than any conspirator could have pulled off on his own. See *Callanan*, 364 U.S. at 593. The conspiracy also facilitated crimes other than the kickbacks themselves, such as falsified accident reports, phony towing forms, self-inflicted damage to vehicles, and other forms of insurance fraud. See *id.* at 594.

The second element of conspiracy—an overt act—is not seriously disputed. Petitioner took a number of steps "to effect the object" of the conspiracy, as did Moreno, Mejia, and other participating officers. Having satisfied both elements of Section 371, petitioner may be held liable for conspiracy.

B. Petitioner's Textual Argument Is Premised On A Mistaken Assumption: That All Conspirators Must Satisfy Each Element Of The Substantive Offense

Petitioner does not directly address the elements of a Section 371 conspiracy. Indeed, petitioner does not refer at all to the text of the statute under which he was convicted. See Pet. Br. viii-ix (listing federal statutes, but not Section 371). Instead, petitioner focuses on the requirement for an extortion conviction under Section 1951 that property be taken "from another." He argues that members of a conspiracy cannot satisfy that requirement if the property is taken from one of them. According to petitioner, the government must therefore prove that the conspirators "agreed among themselves to obtain property from a person *outside* the conspiracy." *Id.* at 21 (emphasis added). But that argument cannot be squared with well-established principles of conspiracy liability, or with the statute itself.

1. Petitioner's primary argument purports to follow from the Hobbs Act's text. The statute punishes "[w]hoever" commits "extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act further defines extortion as "the obtaining of property *from another*, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2) (emphasis added). The word "another" must refer to someone besides the perpetrator of the crime. Pet. Br. 22. So if two or

more people conspire "to exchange property between themselves," petitioner concludes, then "[t]heir agreement does not concern 'another' at all—only themselves." *Ibid.*

Petitioner misreads the statute. When a public official faces prosecution for conspiracy to commit extortion under Section 1951(a), "Whoever" refers to the defendant official, and "property from another" refers to property not belonging to that official. See *Merriam-Webster's Collegiate Dictionary* 48 (10th ed. 1993) (defining "another" to mean, *inter alia*, "different or distinct from the one first considered"). The phrase "with his consent" similarly refers to the consent of someone other than the public official. Those conditions were satisfied here: Petitioner obtained property from another (Moreno and Mejia), and did so "with his consent." Petitioner therefore obstructed commerce "by extortion"; and, in forming an agreement for that purpose, he also "conspire[d] so to do."

Petitioner's error lies in his unstated—but repeated—assumption that *no* conspirator may face liability unless *all* conspirators have agreed to commit every element of the crime. This error is well illustrated by an example petitioner offers:

> John, a policeman, says to Susan, a civilian, "*Let us agree to obtain money from another*, by getting that person's consent through use of my right and authority as a public official." Susan then asks, "Who did you have in mind?" If John were to answer, "Oh, I meant *you* should pay me," Susan would rightly be confused.

Pet. Br. 23 (first emphasis added). In this example, John's phrasing suggests that both he and Susan ("us") are the subject of all the conduct: not only the

"agree[ing]," but also the "obtain[ing]." But while both Susan and John can agree, only John can obtain money from another. In other words, what makes the phrasing problematic is that it requires both participants to take both actions—or at least to be capable of doing so.

Under long-established principles of conspiracy liability, however, "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Salinas*, 522 U.S. at 63. Indeed, a conspirator can be held liable even if he, himself, has agreed to commit *none* of the elements of the substantive offense. For instance, if the "plan * * * calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators." *Id.* at 64. Moreover, "[a] person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense" himself. *Ibid.* All that is required is that the conspirators "share a common purpose" that a crime be committed. *Ibid.*

This last principle—that not all conspirators must be capable of committing the substantive offense—is illustrated by *United States* v. *Holte*, 236 U.S. 140 (1915). That case involved a prosecution for conspiracy to violate the Mann Act, ch. 395, 36 Stat. 825, which imposed liability on "any person who shall knowingly transport * * * in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution or debauchery." The question was whether "the transported woman" could be guilty of conspiring to violate the Act based on the general federal conspiracy statute—that is, whether she had "'conspire[d] to commit an offence against the United States.'" *Holte*,

236 U.S. at 144 (quoting predecessor of Section 371). The defendant argued that conspiracy liability could only be predicated on "an offence that all the conspirators should commit," and that, as the woman who was transported, she could not be guilty of the substantive offense. *Ibid.* The Court disagreed, explaining that under "the common law as to conspiracy," the word "'commit' means no more than bring about." *Ibid.* Given that definition, "plainly a person may conspire for the commission of a crime by a third person," even if she could not commit the crime herself. *Ibid.*; see *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915) ("A person may be guilty of conspiring although incapable of committing the objective offense.").

In this case, although the shop's owners could not themselves commit public-official extortion, they nevertheless could "conspire for the commission of a crime by a third person"—namely, by petitioner and other BPD officers. To return to petitioner's example, John might have said: "Let us agree *that I, a public official*, will obtain money from another, namely you, by getting your consent through use of my right and authority as a public official." The conspirators in that scenario can agree to the use of the public official's authority in exchange for private gain; and if the private party actively participates in the corrupt scheme, see pp. 33-39, *infra*, then the two are conspirators.

2. Petitioner's other textual arguments are similarly unavailing.

a. Petitioner contends that "when a public official and a citizen merely agree to *exchange* property between themselves, it cannot be said that both parties

are agreeing to *obtain* the property." Pet. Br. 23. But their conspiratorial agreement need not be that "both parties" will obtain the property. Rather, they need only agree that "a public official [will] obtain[] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans*, 504 U.S. at 268.

b. For the same reason, petitioner errs in suggesting that the government's interpretation would have the conspirators agreeing "to obtain *their own* consent" to the payment. Pet. Br. 24 (emphasis added). The consent of all conspirators is not required, only the consent of the person giving money to the public official.

c. Petitioner argues that the Hobbs Act "punishes 'whoever' conspires to obtain property from 'another,'" thereby indicating "that the 'whoever' and the 'another' must be *different* people." Pet. Br. 24. That argument depends on cobbling together the conspiracy language of Section 1951(a) ("Whoever" interferes with commerce by "extortion or attempts or conspires so to do") with the definition of extortion in Section 1951(b)(2) ("obtaining of property from another"). But petitioner was not convicted of conspiracy under Section 1951(a). Rather, he was convicted under Section 371, which applies when "two or more persons conspire * * * to commit any offense against the United States." Petitioner does not dispute that he committed such an offense, or that he formed an agreement in service of that goal. That is all a conviction under Section 371 requires. See pp. 15-20, *supra*.

Even if petitioner had been convicted of conspiracy under Section 1951, that would not save his argument. Petitioner is correct that the person who "obtain[s]"

the property must be different than "another," but that does not mean that the person who obtains the property must be the same as "Whoever" is prosecuted for conspiracy. Indeed, if petitioner were correct that "Whoever" conspires must also be the person who "obtain[s]" the property, then *only* public officials could be conspirators, because only public officials can obtain property "under color of official right." Yet the statute gives no indication that private parties who actively facilitate an extortionate scheme are immune from conspiracy liability. To the contrary, petitioner himself cites New York cases in which private parties were held liable for conspiring with public officials. See Pet. Br. 41 (citing *People* v. *Kay*, 105 N.Y.S.2d 687, 688 (N.Y. App. Div. 1951) (per curiam), in which "police officers conspired with two civilians," and *In re Stephens*, 203 N.Y.S. 500, 504-505 (N.Y. App. Div. 1924), in which a private attorney conspired with a district attorney). In cases like those, where a private party conspires with a public official, the private party can be the "Whoever" in Section 1951(a), even if the "obtaining of property from another * * * under color of official right" in Subsection 1951(b)(2) was done by the official.[4]

d. Finally, petitioner argues that "the government's interpretation erases the requirement of obtaining property 'from another,'" because "no statutory language is needed to confirm the metaphysical impossibility of paying oneself a bribe with one's own

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[4] Petitioner's argument overlooks the fact that "Whoever" in Section 1951(a) is not the subject of "obtaining of property" in Section 1951(b)(2). Instead, "Whoever" refers to a person who "obstructs, delays, or affects commerce" or a person who "attempts or conspires so to do." 18 U.S.C. 1951(a).

money." Pet. Br. 29. But all sides agree that the property must change hands; the only question is whether it may go from a co-conspirator to a public official (the government's view), or must it go to the official from someone uninvolved in the conspiracy (petitioner's view). The answer to that question has nothing to do with "the metaphysical impossibility of paying oneself a bribe." And in any event, under either interpretation, the word "obtaining" would itself be sufficient to indicate movement from one person to another: "Obtaining property requires 'not only the deprivation but also the acquisition of property.'" *Sekhar* v. *United States*, 133 S. Ct. 2720, 2725 (2013) (quoting *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 404 (2003)).

3. Petitioner's interpretation of Section 1951 would also produce at least three anomalies that Congress likely did not intend. See *Sullivan* v. *Hudson*, 490 U.S. 877, 890 (1989) ("Congress cannot lightly be assumed to have intended" a reading that produces "anomalous" results.).

a. Petitioner does not dispute that, for purposes of his substantive extortion convictions, the statutorily required roles were satisfied: Petitioner was the "Whoever" in Section 1951(a), and Moreno was "another" in Section 1951(b) from whom property was obtained "with his consent." Yet under petitioner's reading, those same respective roles do not suffice for purposes of a conspiracy conviction. Congress would have had no reason to bar conspiracy liability when the bribe-payor actively participates with the corrupt official in the undisputed selling of his office.

Petitioner responds that a bribe-payor like Moreno cannot simultaneously "occupy both roles"—that is,

cannot be both "a conspirator and the 'another' from whom the conspirators wrongly obtain property." Pet. Br. 30. But that response simply begs the question presented (*i.e.*, whether "property from another" may come from a participant in the conspiracy). Rather than *explaining* the anomaly that his view would create, petitioner simply reasserts that his view is correct.

b. In addition, petitioner's interpretation would perversely penalize the government for alleging and proving additional facts at trial. Under petitioner's reading, a public official who agrees with other officials to receive a bribe from a private citizen would be guilty of conspiracy. But if those same officials *also* conspire with the bribe-payor, then *no one* is guilty of conspiracy.

This case illustrates the point. If petitioner had conspired *solely* with his fellow BPD officers, then he would not dispute that all elements at issue—including "property from another" and "with his consent"—would be satisfied. But because the evidence established that petitioner conspired "with other Baltimore Police Department Officers * * * , *and with Moreno and Mejia*," petitioner says that his conviction was defective. J.A. 36 (emphasis added). Under petitioner's interpretation, the government would have been better off charging and proving a narrower conspiracy involving fewer participants. There is no reason that a narrower conspiracy involving fewer participants should receive criminal punishment, while a broader one involving more participants receives none.

c. Petitioner's theory would also create serious conceptual problems in cases involving payments

drawn from artificial entities, such as businesses or unions, that can act only through their agents. It may be difficult in such cases to determine whose property was "obtain[ed]" and with whose "consent." See, *e.g.*, *United States* v. *Spitler*, 800 F.2d 1267, 1269-1270 (4th Cir. 1986) (corporation's vice president authorized gifts to public official purchased with company funds, in return for official's promise to approve company's fraudulent invoices). It is also unclear whether the answer might depend on the particular entity's form—for instance, whether or not it is incorporated, or whether it is owned or controlled by the bribe-payor—even though those formalities have little to do with culpability.[5]

4. Finally, petitioner's reading would also create a substantial loophole in conspiracy law, because many federal criminal statutes use phrases like "from another" or "to another." For instance, a prohibition on passing state secrets applies to a federal employee who "obtains from another" any coded information and who, without authorization, "willfully publishes or furnishes to another" that information. 18 U.S.C. 952. Imagine a State Department employee who forms an illicit agreement to acquire coded information from a Ukrainian spy and sell it to his contact in the Russian government. Under petitioner's interpretation, *none* of the three participants in that scenario would face

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[5] In this case, for example, Majestic was initially a limited liability company but became a corporation while the kickback scheme was in progress, C.A. App. 655-656, 736; J.A. 145, and the record does not indicate who owned its stock. There is no reason to think that Congress would have wanted petitioner's criminal liability to turn on the particular corporate form of the entity from which his bribes were paid.

conspiracy liability: The conspirators would be incapable of "obtain[ing] from another" or "furnish[ing] to another."

Petitioner's theory would create the same gap in several other criminal prohibitions. See, *e.g.*, 18 U.S.C. 495 (forging contracts "for the purpose of * * * enabling *any other person*" to receive money from the United States) (emphasis added); 18 U.S.C. 500 (issuing a fake money order to "fraudulently enabl[e] *any other person*" to obtain money from the postal service) (emphasis added); 18 U.S.C. 1543 (forged passport that is "furnishe[d] *to another* for use") (emphasis added). Yet such crimes are frequently committed through collusion. For instance, in *United States* v. *Zayyad*, 741 F.3d 452 (4th Cir. 2014), the defendant was convicted under Section 371 for conspiring with a drug dealer to traffic in counterfeit goods, in violation of 18 U.S.C. 2320, by supplying the dealer with fake Viagra and Cialis. 741 F.3d at 456-458. Since "the term 'traffic' means to transport, transfer, or otherwise dispose of, *to another*," 18 U.S.C. 2320(f)(5) (emphasis added), petitioner's theory would have precluded conspiracy liability.

C. Petitioner's Other Arguments For Limiting Conspiracy Liability Are Unpersuasive

Petitioner's non-textual arguments are based on the premise that the government's reading of the Hobbs Act "would turn every payment of a bribe to a public official into a conspiracy to commit extortion." Pet. Br. 18. That premise misunderstands the Act's consent requirement and runs counter to longstanding principles of conspiracy law.

1. Obtaining property with another's "consent" is not equivalent to forming a conspiratorial agreement

Petitioner argues that the government's reading of the Hobbs Act "turns every act of receiving a bribe into a conspiracy to commit extortion." Pet. Br. 37 (capitalization altered). He begins by noting that the Act requires property to be given with the bribe-payor's "consent." 18 U.S.C. 1951(b)(2). According to petitioner, that same consent will also "establish that the bribe-payor and the public official *agreed*" to the transaction, automatically making the bribe-payor a co-conspirator to the extortion. Pet. Br. 37. As a consequence, he concludes, the Hobbs Act would become a "broad prohibition on *paying* bribes," *id.* at 31, contrary to Congress's choice elsewhere in the criminal code to attack bribery with precision, *id.* at 33-34 (citing 18 U.S.C. 201(b)(1), 210, 212(a), 226(a)(1), 666). But petitioner errs in conflating the Act's "consent" requirement with the *mens rea* necessary to form a conspiracy, which is a much higher threshold.

At common law, robbery was the obtaining of property by the application of pressure "such as may overcome the ordinary free will of a firm man." James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 881 (1988) (Lindgren) (quoting *King* v. *Southerton*, 102 Eng. Rep. 1235, 1241 (1805)). In both the Field Code and New York penal law, the taking from another was said to be accomplished "against his will." Commissioners of the Code, *The Penal Code of the State of New York* § 280, at 98 (1865) (*Field Code*); see N.Y. Penal Law § 224, at 68 (1881) (same). This was a stringent standard: "[T]he physical power to resist [must be] overcome by

force, or what is equivalent in law, the moral power to refuse [must be] prostrated by fear." *Field Code* § 584 note, at 210.

Instances involving a lesser degree of coercion, by contrast, qualified as extortion, in which the taking was said to occur "with his consent." *Field Code* § 613, at 220; see N.Y. Penal Law § 552, at 174 (1881) (same). The difference between the two crimes was understood to be one of degree. See *Field Code* § 584 note, at 211 ("Thus extortion partakes in an inferior degree of the nature of robbery."). The Hobbs Act preserved the traditional distinction, with "th[e] element of consent" continuing to serve as "the razor's edge that distinguishes extortion from robbery." *United States* v. *Zhou*, 428 F.3d 361, 371 (2d Cir. 2005); see *United States* v. *Coppola*, 671 F.3d 220, 240 (2d Cir. 2012) ("[T]he consent element serves * * * to distinguish between two illegal means of so obtaining property: extortion (with consent) and robbery (without consent)."), cert. denied, 133 S. Ct. 843 (2013).

As used by the Hobbs Act, therefore, consent simply indicates the taking of property under circumstances falling short of robbery. But the presence of consent does not necessarily indicate a mutual "agreement" between co-conspirators, which is "the essential element of the crime" of conspiracy. *Iannelli* v. *United States*, 420 U.S. 770, 777 n.10 (1975). That much is made clear by the Act itself, which includes coercive extortion, in which payment is made "with [another's] consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. 1951(b)(2). No one would say that such a payment signals the "collective criminal agreement" necessary for a conspiracy. *Callanan*, 364 U.S. at 593. The

same is true in cases of "extortion accomplished by fraud," where property is taken "under a false pretense of official right." *Evans*, 504 U.S. at 269. Yet clearly both types of extortion—coercive extortion and extortion by fraud—may still occur "with consent" from another. Petitioner is thus wrong to suggest that, in every case of extortion, the participants will automatically satisfy the *mens rea* for conspiracy.[6]

For the same reason, petitioner is also wrong that, under the government's approach, every bribe-payor would be a co-conspirator. Consent is not equivalent to conspiratorial agreement; that the payor gave his "consent" means only that property changed hands under conditions not amounting to robbery. In cases where the payor is simply complying with an official demand, for instance, no meeting of the minds would occur. See *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) ("The essence of conspiracy is 'the combination of minds in an unlawful purpose.'") (quoting *United States* v. *Hirsch*, 100 U.S. 33, 34 (1879)). But where the participants have "combined efforts * * * in pursuance of [a] plan," a genuine "partnership in crim-

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[6] Petitioner also alludes to the rule that a defendant may not be convicted of both the substantive crime and conspiracy "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." Pet. Br. 38 (quoting *Pinkerton*, 328 U.S. at 643). But that rule, often referred to as Wharton's Rule, "applies only to offenses that *require* concerted criminal activity," *Iannelli*, 420 U.S. at 785, which Hobbs Act extortion does not. The circumstances of this case would also fall under the so-called third-party exception to Wharton's Rule, because "the conspiracy involves more persons than are required for commission of the substantive offense." *Id.* at 782 n.15.

inal purposes" would exist, *Kissel*, 218 U.S. at 608, and they may be prosecuted for conspiracy.

2. An "active participation" requirement is consistent with conspiracy principles

In accordance with the foregoing, the Fourth Circuit correctly recognized that "'mere acquiescence'" to an official demand "is not punishable under conspiracy principles." Pet. App. 20. Where a bribe-payor "actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme," by contrast, he may face liability as a conspirator. *Id.* at 22. Petitioner mischaracterizes this distinction as "fabricated." Pet. Br. 46. In fact, not only is the distinction essential to the formation of a conspiracy, it has deep roots in this Court's conspiracy case law.

The Court first alluded to such a distinction in *Holte*, *supra*, where the question was whether a woman transported in violation of the Mann Act could conspire with the man with whom she traveled between states. The trial court dismissed the indictment against her, reasoning that "she was no party to [the offense] but only the victim." 236 U.S. at 144. This Court disagreed. While acknowledging that "there may be a degree of cooperation that would not amount to a crime," the Court declined to rule out in all cases a conspiracy involving the woman being transported. *Id.* at 144-145. For instance, if the woman "should suggest and carry out [the] journey," and if she "should buy the railroad tickets, or should pay the fare" for the trip, then a conspiracy might exist. *Id.* at 145. The Court therefore found "little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim." *Ibid.*

The Court elaborated on this theme in *Gebardi* v. *United States*, 287 U.S. 112 (1932), another prosecution for conspiracy to violate the Mann Act. There, the Court stressed features of the statute that are pertinent here as well:

> Congress set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation. In every case in which she is not intimidated or forced into the transportation, the statute necessarily contemplates her acquiescence. Yet this acquiescence, though an incident of a type of transportation specifically dealt with by the statute, was not made a crime under the Mann Act itself.
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> * * * * *
>
> [W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished.

Id. at 121, 123. In other words, where Congress has chosen to criminalize only one half of a transaction that typically involves consent or acquiescence, then conspiracy liability should presumptively require a higher level of coordinated activity. See *id.* at 119 ("In applying this criminal statute we cannot infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter.").

The *Gebardi* Court accordingly held that a conspiracy could exist, but only if the woman's role in the crime was "more active than mere agreement on her

part" to the illegal transportation. 287 U.S. at 119. Applying that test, it determined that the conspiracy convictions at issue could not stand. The woman had merely "consented" to her transportation across state lines, the Court explained, but there was "no evidence that she purchased the railroad tickets or that hers was the active or moving spirit in conceiving or carrying out the transportation." *Id.* at 116-117.

The reasoning of *Gebardi* applies with full force to Hobbs Act extortion, which shares two key features with the Mann Act. First, the Hobbs Act penalizes one half of a bilateral transaction—as petitioner himself points out. See Pet. Br. 25-26, 32-34. Second, at least in cases of public-official bribery, "the statute necessarily contemplates [the] acquiescence" of the bribe-payor. *Gebardi*, 287 U.S. at 121. In reliance on these features, courts have construed the Hobbs Act to permit liability for a bribe-payor whose conduct was "more active than mere acquiescence" to an extortionate demand. *Spitler*, 800 F.2d at 1276. In *Spitler*, for instance, the Fourth Circuit upheld a bribe-payor's conviction for aiding and abetting extortion because he had "created a symbiotic relationship with [the public official] through which [he] and [his employer], in exchange for subsequent payments to [the official], would receive substantial financial benefits from [the official's] approval of [the employer's] false invoices." *Id.* at 1278. And in this case, the Fourth Circuit applied the same reasoning to extortionate conspiracies. Pet. App. 22-25.[7]

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[7] The jury instructions in this case "caution[ed] * * * that mere knowledge or acquiescence, without participation in the unlawful plan, [was] not sufficient" to "establish membership in the conspiracy." J.A. 195.

The Fourth Circuit is not alone in applying *Gebardi* to Hobbs Act extortion. For decades, lower courts have permitted bribe-payors to face aiding-and-abetting liability for actively participating in bribery schemes. See, *e.g.*, *United States* v. *Cornier-Ortiz*, 361 F.3d 29, 40 (1st Cir. 2004) (upholding conviction for aiding and abetting extortion where "[t]he evidence supported the conclusion that some sort of quid pro quo arrangement was in place and that Cornier did more than merely acquiesce to it"); *United States* v. *Wright*, 797 F.2d 245, 252 (5th Cir. 1986) ("[T]he evidence indicates that Wright did aid and abet [the public official's] extortion by actively inducing and soliciting the payment to [the official]."), cert. denied, 481 U.S. 1013 (1987); *United States* v. *Zeuli*, 725 F.2d 813, 817 (1st Cir. 1984) ("We have been directed to no place in the record that supports the contention that Zeuli was a victim of the extortion rather than a perpetrator of it."); *United States* v. *Marchan*, 32 F. Supp. 3d 753, 764 (S.D. Tex. 2013) ("The evidence was clear (and was practically uncontroverted) that [the defendant] was actively and willingly involved in this scheme and that he was not a victim."); *United States* v. *Nelson*, 486 F. Supp. 464, 490 (W.D. Mich. 1980) ("But the defendant in this case is more than just a payor of extorted money. He is an initiator of an extortion."); see also *United States* v. *Johnson*, 337 F.2d 180, 196 (4th Cir. 1964) (upholding conviction for aiding and abetting violation of conflict-of-interest statute where defendants had "a far more active role" than "merely as payers" of a bribe), cert. denied, 379 U.S. 988 (1965), 385 U.S. 846, and 385 U.S. 889 (1966). Where a bribe-payor has merely acquiesced to an official demand, by contrast, he will not be held liable

as an aider and abettor. See *United States* v. *Tillem*, 906 F.2d 814, 824 (2d Cir. 1990) (reversing conviction for aiding and abetting extortion where defendant was "a victim succumbing to a climate of unstated prerequisites to doing business with particular public officials" (citation omitted)).

Thus, the distinction between mere acquiescence and active participation was not "made-up" by the Fourth Circuit, as petitioner claims. Pet. Br. 3. To the contrary, "[f]inding culpability when a 'victim' goes beyond passive compliance and becomes an active participant in a conspiracy has been a principle of our common law from the turn-of-the-century." *Tillem*, 906 F.2d at 822 (citing *Holte*).[8]

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[8] This Court has applied similar reasoning in other contexts. In *Abuelhawa* v. *United States*, 556 U.S. 816 (2009), the Court considered whether the prohibition on using a phone to "facilitate" drug sales applied to a defendant who had merely purchased a small quantity of drugs on his cell phone. *Id.* at 818. The Court read the prohibition on facilitation narrowly (to mean "'aid' and 'abet'") rather than broadly (to mean "make a sale easier") in recognition that the use of phones is a common feature of almost any drug transaction. *Id.* at 820-822 (citing *Gebardi*). Similarly, in *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), the Court held that a drug manufacturer would not face conspiracy liability for its otherwise legal sale of a prescription drug to a physician merely because the manufacturer knew that the physician intended to resell the drug illegally. *Id.* at 712 & n.8. But if the manufacturer "work[ed] in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there [would be] no legal obstacle to finding that the supplier *not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible.*" *Id.* at 713 (emphasis added); see *ibid.* (conspiracy liability permitted where "[t]here is informed and interested cooperation, stimulation, instigation").

Petitioner asserts that the distinction is "unworkable and hopelessly vague." Pet. Br. 48. But he points to no evidence that juries or judges have struggled with it in the years since *Gebardi*, or that its application has led to arbitrary or unjust results. "[T]he trier of fact is quite capable of deciding the intent with which words were spoken or action taken as well as the reasonable construction given to them by the official and the payor." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring). And as to vagueness, this Court recently found no reason to "doubt the constitutionality of laws that call for the application of a qualitative standard * * * to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly some matter of degree.'" *Johnson* v. *United States*, No. 13-7120 (June 26, 2015), slip op. 12 (alteration omitted) (quoting *Nash* v. *United States*, 229 U.S. 373, 377 (1913)). Indeed, "[c]lose cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *United States* v. *Williams*, 553 U.S. 285, 306 (2008).

In enacting the Hobbs Act, Congress chose to criminalize behavior that "obstructs, delays, or affects commerce" by means of extortion. 18 U.S.C. 1951(a). It also recognized that extortionate schemes involving multiple participants can have just as great an impact—if not greater—which is why it imposed liability on anyone who "conspires so to do." *Ibid.* Where a public official initiates extortion on his own, with only the "mere acquiescence" of the bribe-payor, then the official should alone face liability. *Gebardi*, 287 U.S. at 119. But where (as here) a bribe-payor not only

acquiesced, but in fact "was the active or moving spirit in conceiving or carrying out the" scheme, *id.* at 117, there is no reason to doubt that Congress would deem him to be just as culpable as any other conspirator.

3. The government's interpretation would not impose liability on extortion "victims"

Another significant theme running throughout petitioner's brief is that the government seeks to turn bribe-payors like Moreno and Mejia into "the victims of their own conspiracy." Pet. Br. 2. This allegedly shows that the government's interpretation must be flawed: "A party cannot at the same time be both a victim of an extortion conspiracy (the party who parts with his rightful property) and also one of the conspiratorial extortionists (the party who conspires with others to wrongly obtain possession of the same property)." *Id.* at 23-24; see, *e.g.*, *id.* at 2 (according to government, "to bribe an official is to conspire with that official to victimize oneself"); *id.* at 17 ("It makes no sense to say that the victim of the conspiracy * * * is also a conspirator."); *id.* at 18 ("victimize oneself").

Petitioner's argument overlooks the variety of extortionate schemes covered by official-right extortion. The crime of extortion, which dates from at least the reign of King Edward I, was traditionally viewed not simply as a property crime, but as a transgression directly against the sovereign: The offense was said to be *contra pacem domini regis*—"a breach of the King's peace." Lindgren 833. The word "extortion" may call to mind the predations of a corrupt public official who pressures hapless citizens into paying him tribute, and the Hobbs Act undoubtedly covers such behavior. See *id.* at 842, 850-851 (citing common law cases). Yet the Act *also* undoubtedly covers "the

rough equivalent of what we would now describe as 'taking a bribe.'" *Evans*, 504 U.S. at 260; see *id.* at 267 n.18 ("[B]ribery and extortion as used in the Hobbs Act are not mutually exclusive.") (citation, internal quotation marks, and brackets omitted). When a public official commits extortion of this variety, by selling official acts for private gain, the true "victim" is the public. For as Blackstone explained, "extortion is an abuse of public justice." 4 William Blackstone, *Commentaries on the Laws of England* 141 (1769); see *Wilkie*, 551 U.S. at 564 ("[T]he crime of extortion focused on the harm of public corruption, by the sale of public favors for private gain."). Petitioner's description of the bribe-payor as "the victim of the conspiracy," Pet. Br. 17, is thus at odds with "the core idea" of the Hobbs Act—namely, that "extortion [i]s a species of corruption." *Wilkie*, 551 U.S. at 564 n.12.

The "victim" label is especially inappropriate when the Hobbs Act is interpreted, consistent with *Gebardi*, to impose conspiracy liability only where the bribe-payor's role in the transaction was "more active than mere agreement." 287 U.S. at 119. One who does not merely acquiesce to an official demand, but instead "was the active or moving spirit in conceiving or carrying out" an extortionate scheme, is no victim at all. *Id.* at 117. In such cases, there is "little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the [bribe-payor] always is the victim." *Holte*, 236 U.S. at 145.

This case vividly illustrates the point. Moreno and Mejia recognized that partnering with BPD officers would be "beneficial," and they eagerly joined the kickback scheme in order to increase business to

Majestic. J.A. 95-97. They also took an active role in making the scheme work. Moreno consulted with participating officers to select the cars that would be most profitable to have in his shop. Pet. App. 7-9; J.A. 105-107. To convince insurance companies that damaged vehicles had been rendered undrivable, Moreno and Mejia created phony towing records. J.A. 152-153. Moreno often caused additional damage to cars to ensure maximum insurance reimbursement. J.A. 101-102, 107, 139. Insurance payments were deposited directly into Majestic's business account, which Moreno used to pay officers; Mejia concealed those payments on Majestic's books as "advertising and promotion." J.A. 159; see J.A. 145-147, 149-151. Participation in the kickback scheme was highly lucrative for Moreno and Mejia, eventually resulting in more than 90% of Majestic's business. J.A. 96, 100, 127.

The record thus refutes any suggestion that the shop's owners were the "victims" of this scheme. Indeed, at trial, petitioner's counsel tried to convince the jury that Moreno was its chief executive—that he had "recruited most of the officers," J.A. 127, and had "corrupted a great number of Baltimore City police officers," J.A. 70. See C.A. App. 1226 ("Moreno, and to a lesser extent, his brother, Edwin Mejia, were clearly involved in this conspiracy up to their ears to get policemen to refer cars to them."). Having participated as full partners in the kickback scheme, Moreno and Mejia were petitioner's co-conspirators, not his victims. See J.A. 66 ("That's why kickback schemes are successful. Everybody gets what they want.").

4. "Principles of federalism and lenity" do not justify petitioner's approach

Finally, petitioner appeals to "principles of federalism and lenity." Pet. Br. 42 (capitalization altered). Neither assists him.

a. Petitioner's federalism argument is premised on two errors: first, that "there is no plausible textual support for the government's theory"; and second, that the government's "Hobbs Act interpretation w[ould] transform every payment of a bribe to a state or local official into a federal conspiracy to commit extortion." Pet. Br. 43. For the reasons explained above, he is wrong on both counts. A proper reading of the Hobbs Act would not turn the statute into a general prohibition on paying bribes. Moreover, Congress expressly contemplated that *some* acts of extortion would be made possible by conspiratorial agreements, and it determined that they should be punished. See 18 U.S.C. 1951(a) ("Whoever * * * conspires so to do"). Petitioner offers no reason to believe that his agreement with Moreno and Mejia to facilitate the kickback scheme lay outside Congress's concern.

b. Petitioner's reliance on the rule of lenity fares no better. That rule applies only when a criminal statute contains a "grievous ambiguity or uncertainty." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citation omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of that rule," *Muscarello*, 524 U.S. at 138. Instead, the rule applies "only if, after seizing everything from which aid can be derived," the

Court "can make no more than a guess as to what Congress intended." *Ibid.* (citation and internal quotation marks omitted). For the reasons described above, petitioner's conspiracy conviction is consistent with the best reading of the statute and with longstanding principles of conspiracy law.

D. Petitioner Also Conspired With Other BPD Officers, Not Only With Moreno And Mejia

Even if petitioner were correct that, in a Hobbs Act conspiracy, there must be an agreement among conspirators other than the bribe-payor, such an agreement existed in this case. As the court of appeals recognized, petitioner's argument "is factually flawed, in that it relies on an evidentiary premise—that his only coconspirators were Moreno and Mejia—that is entirely at odds with the record." Pet. App. 25 n.14. In fact, the indictment against petitioner alleged, and evidence at trial proved, "a wide-ranging conspiracy involving dozens of BPD officers." *Ibid.*

The Superseding Indictment alleged that petitioner "did knowingly and unlawfully combine, conspire, confederate, and agree together, with other Baltimore Police Department Officers," as well as with Moreno and Mejia. J.A. 36; see *ibid.* ("It was a purpose of the conspiracy for Moreno and Mejia to enrich over 50 BPD Officers, including the defendants."). The trial evidence showed that petitioner learned of the kickback scheme from another BPD officer, most likely Officer Rodriguez, who was indicted along with petitioner but pleaded guilty. J.A. 28, 111-114; Pet. App. 7. After Officer Rodriguez told petitioner about the kickback scheme, he and petitioner worked together on at least one occasion, during which petitioner helped Officer Rodriguez and Moreno collect a vehicle

from an accident scene. J.A. 119-123; see J.A. 122 (petitioner and Officer Rodriguez "pretend[ed] that they didn't know each other" at the scene); see also Pet. App. 8-9 & n.7. Petitioner also recruited other officers and brought them in on the scheme. J.A. 125-127, 129-130, 137-138, 172-173. Given all this evidence, "the jury was entitled to find [other participating] BPD officers to be [petitioner's] coconspirator[s]." Pet. App. 25 n.14.

Petitioner says that "the government's theory at trial was that Moreno and Mejia were petitioner's co-conspirators." Pet. Br. 10. That formulation is incomplete at best. Although the government stressed petitioner's ties to the shop's owners, it also emphasized petitioner's ties to other officers: "[T]here are other police officers that you heard about that you also can consider their conduct in determining whether they were part of the conspiracy *and whether there was a conspiracy*." J.A. 197 (emphasis added). Indeed, it is hard to imagine how the jury could believe that petitioner committed extortion—as it obviously did, having convicted him on three counts—yet *not* believe that he participated in the scheme along with other officers.

The indictment and trial evidence thus supported convicting petitioner of participating in a factually lesser-included conspiracy involving only BPD officers. Cf. *United States* v. *Miller*, 471 U.S. 130, 135, 145 (1985) (where indictment can be read to cover a fraudulent scheme that is "much narrower than, though included within, the scheme that the grand jury had alleged," defendant may be convicted of that narrower scheme). Similarly, any error in the jury instructions would have been harmless. Cf. *Skilling* v. *United*

States, 561 U.S. 358, 414 & n.46 (2010) (harmless-error analysis applies "when a jury is instructed on alternative theories of guilt," one of which is "legally invalid," and the jury returns a general verdict). Even if petitioner were correct about the question presented, therefore, his conspiracy conviction should nevertheless be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or

the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.